

## St. John's Law Review

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Volume 90  
Number 3 *Volume 90, Fall 2016, Number 3*

Article 10

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March 2017

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#### Recommended Citation

Kaitlin Decker (2016) "The Chase Utley Question: A Controversial Collision Between Tort Law and Professional Sports," *St. John's Law Review*. Vol. 90 : No. 3 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol90/iss3/10>

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## NOTES

# THE CHASE UTLEY QUESTION: A CONTROVERSIAL COLLISION BETWEEN TORT LAW AND PROFESSIONAL SPORTS

KAITLIN DECKER<sup>†</sup>

### INTRODUCTION

The slide was late. The slide was high. The slide was questionably legal and arguably dirty.<sup>1</sup>

It happened on a Saturday night in October, just outside downtown Los Angeles. The lights were bright, the crowds deafening, the atmosphere electric. It was Game 2 of the National League Division Series between the Los Angeles Dodgers and the New York Mets. The Dodgers, touting one of baseball's largest payrolls, were aiming to prove that the franchise was capable of finally making it deep in the playoffs. The Mets, perennial last-place division finishers, were in the playoffs for the first time in a decade, propelled by a youthful starting pitching rotation and a rejuvenated fan base. In the bottom of the seventh inning, the Mets led the game 2-1, but the Dodgers had the tying run on third base, with pinch-hitter Chase Utley on first. It was then that batter Howie Kendrick hit the ball on the ground to second baseman Daniel Murphy, who threw to shortstop Ruben Tejada, waiting at second base for the throw to put Utley out.

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<sup>1</sup> Bill Plaschke, *Chase Utley's Slide Was Late, High and Arguably Dirty*, L.A. TIMES (Oct. 10, 2015, 11:10 PM), <http://www.latimes.com/sports/dodgers/la-sp-dodgers-mets-plaschke-20151011-column.html>.

The runner on third would score regardless; the Dodgers would tie up the game with only one out. As Chase Utley approached second base, he hurled his body, feet first, through the air, aiming at the vulnerable shortstop. Upon sliding, he collided fast and hard with Tejada's lower body. The ensuing spill left Tejada lying on his back on the ground, writhing in pain. Second base umpire Chris Gucchione called Utley safe at second. Home plate umpire Jim Wolf called the medical staff for Tejada, who left the game with a season-ending broken fibula. The play sparked a four-run seventh inning that capped off a 5-2 Dodgers victory.

To some, Utley slid far too late. To others, he slid at the appropriate time. Some said it was a smart play, designed to break up the play and extend the inning to give the Dodgers an opportunity to stage a comeback. Others declared it just another dirty play from a player who had consistently skirted the safety rules of the game for the majority of his fifteen-year career.

In the hours, days, and weeks following the collision, former and current players, coaches, pundits, and fans engaged in rousing debate on every media platform about the characterization of the controversial play.<sup>2</sup> The immense public outcry and discussion likely contributed to Major League Baseball's Chief Baseball Officer Joe Torre's imposition of a two-game suspension on Utley the day following the incident.<sup>3</sup> Torre cited Utley's violation of the Official Rules of Major League Baseball 5.09(a)(13)<sup>4</sup> as the reason for the suspension.<sup>5</sup>

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<sup>2</sup> See, e.g., Joel Sherman, *Why Chase Utley's Slide Is a Perfect Storm for Controversy*, N.Y. POST (Oct. 12, 2015, 1:38 PM), <http://nypost.com/2015/10/12/why-chase-utleys-slide-is-a-perfect-storm-for-controversy>; CJ Nitkowski, *Players Sound Off on Utley Slide*, FOXSPORTS (Oct. 11, 2015, 7:00 PM), <http://www.foxsports.com/mlb/just-a-bit-outside/story/chase-utley-slide-los-angeles-dodgers-new-york-mets-rub-en-tejada-broken-leg-players-speak-101115>.

<sup>3</sup> Ken Gurnick, *Utley To Appeal 2-Game Suspension for Slide*, MLB.COM (Oct. 12, 2015), <http://m.mlb.com/news/article/154097810/dodgers-chase-utley-suspended-for-slide>.

<sup>4</sup> MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 42, R. 5.09(a)(13) (Tom Lepperd ed., 2015), [http://mlb.mlb.com/mlb/downloads/y2015/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2015/official_baseball_rules.pdf) [hereinafter 2015 MLB RULES]. The rule states that a runner is out if he "intentionally interfere[s] with a fielder who is attempting to catch a thrown ball or to throw a ball in an attempt to complete any play." *Id.*

<sup>5</sup> Utley announced his intention to appeal the suspension immediately upon its imposition. See Gurnick, *supra* note 3. The Dodgers eventually lost the NLDS series to the Mets in five games, and Utley's suspension hearing was suspended indefinitely, thus postponing final judgment on the nature and legality of the play.

The heated discussions that occurred on talk radio, in print, and on social media, in the wake of this suspension are commonplace for the sports world, likely to be an issue never fully resolved.<sup>6</sup> Even if the league imposes clearer metrics as to what is a legal or an illegal slide, as the March 2016 amendments attempted to do, contact between base runners and fielders will inevitably continue to occur in the heat of competition.<sup>7</sup> Moreover, collisions like the one between Ruben Tejada and Chase Utley will undoubtedly recur, and injuries, such as the season ending one suffered by Tejada, will be the likely result.

When the league fails to adequately create unambiguous revisions to the rules of play, Major League Baseball (“MLB”) is, in essence, brushing off serious player safety risks as merely inherent risks of the game. In such hypothetical cases, players will thus be left without any real recourse by way of the league, the governing body of their sport, which is supposed to protect the interests of the game and, more importantly, the players who

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*See Utley's Hearing on Suspension Appeal Postponed*, MLB.COM (Oct. 19, 2015), <http://m.mlb.com/news/article/154942016/dodgers-chase-utleys-appeal-hearing-postponed>. In March 2016, in light of an official rule change governing runners' contact during a potential double play, Utley's suspension was “rescinded” in an agreement between Major League Baseball and the players' union. *See* Ken Gurnick, *Utley Won't Have To Serve 2-Game Suspension*, MLB.COM (Mar. 6, 2016), <http://m.mlb.com/news/article/166381190/chase-utleys-suspension-overturned>. The cited rationale for the dismissal of Utley's suspension is that there were inconsistencies in how similar plays were called in the past, and in how other players were disciplined—or not disciplined—by the league. Kristie Ackert, *MLB Overturns Chase Utley's Suspension for Leg-Breaking Slide on Ruben Tejada*, N.Y. DAILY NEWS (Mar. 2, 2016, 9:10 PM), <http://www.nydailynews.com/sports/baseball/mets/mlb-overturns-utley-supension-breaking-tejada-leg-article-1.2554514>.

<sup>6</sup> “Chase Utley and his slide, it turns out, are like the topics of immigration or gun control. How you see it depends on which tribe you belonged to even before Saturday night's fateful events at second base at Dodger Stadium.” Joel Sherman, *Why Chase Utley's Slide Is a Perfect Storm for Controversy*, N.Y. POST (Oct. 12, 2015, 1:38 PM), <http://www.nypost.com/2015/10/12/why-chase-utleys-slide-is-a-perfect-storm-for-controversy>.

<sup>7</sup> The March 2016 revisions to the rules of the MLB included new Rule 6.01(j), wherein a runner has to make a “bona fide slide,” which is defined as making contact with the ground before reaching the base, attempting to reach the base with a hand or foot, attempting to remain on the base at the completion of the slide, except at home plate, and not changing the runner's path for the purpose of initiating contact with a fielder. MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 70–71, R. 6.01(j) (Tom Lepperd ed., 2016), [http://mlb.mlb.com/mlb/downloads/y2016/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2016/official_baseball_rules.pdf) [hereinafter 2016 MLB RULES]. This revision provides runners with much latitude in coming into second base on double play attempts, but is still subject to the umpire's discretion, and is now eligible for instant replay review. *Id.* at 71.

play it. Does that also mean that there are no other avenues through which players may pursue recourse? Can the answer be found in the law of Torts?

When internal processes provided by a league break down or fall short, tort law often serves as the most successful avenue for punishing excessive contact in professional sports. Tort law exists to encourage socially responsible conduct, to deter dangerous or wrongful conduct, and, in the failure of such efforts, to make an injured party whole. Most litigation of this ilk focuses on unintentional, negligent conduct. However, an analysis of the Utley slide and ensuing Tejada injury through the lens of modern tort law aptly demonstrates that outside the bounds of league rules, customs, and politics, a valid claim of tortious battery may lie for the injuries suffered by Tejada. The validity of this hypothetical claim may also be strengthened due to Joe Torre's immediate declaration that Utley, in making the play, broke a rule of the game originally enacted to ensure player safety.

For decades, professional athletes have demonstrated a remarkable collective hesitation to utilize the judicial system to settle disputes between players, teams, or league officials. However, in recent years, there has been a seismic shift by professional athletes towards the utilization of the court system, signaling that tort law may soon become the avenue of choice for disputes brought by and involving professional athletes.<sup>8</sup>

This Note posits that MLB's current rules and processes for handling plays of questionable legality that result in serious injury are insufficient to provide adequate remedies to injured players. Part I discusses the development of tort liability in professional sports, including the evolution of the doctrine of assumption of risk and its varied applicability to particular sports, both professional and recreational. Part II discusses *Hackbart v. Cincinnati Bengals, Inc.*,<sup>9</sup> one of the landmark cases on the topic of tortious liability in professional sports, and utilizes the modern application of *Hackbart* to make a case for Chase Utley's potential liability in battery in the collision at issue. This Part also evaluates the question of who, including but not limited to Utley, may be liable for Tejada's injury in a

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<sup>8</sup> See *infra* note 106.

<sup>9</sup> 601 F.2d 516 (10th Cir. 1979).

hypothetical action for battery. Finally, Part III explores several proposed solutions to the problem of professional sports injuries, ranging from legislative intervention to revised league controls to the benefits and potential disadvantages of bringing civil action.

This Note concludes that although civil action is likely the most successful route for recourse, selecting that route may have a number of disastrous consequences for professional sports leagues. In an effort to avoid these potential negative consequences, the Note hypothesizes that the most efficient avenue is a revision to the language of league safety rules.

## I. TORT LAW IN PROFESSIONAL SPORTS

An analysis of tort liability in sports is a relatively new endeavor. Historically, courts have been hesitant to grant recovery to athletes injured within the field of play.<sup>10</sup> This judicial reluctance is best illustrated by the words of Chief Judge Cardozo in *Murphy v. Steeplechase Amusement Co. Inc.*,<sup>11</sup> wherein he warned, “[t]he timorous may stay at home.”<sup>12</sup> Cardozo’s opinion laid the foundation for a touchstone of tort liability, the doctrine of assumption of risk—to acknowledge the obvious risks of the game, but to choose to play anyway, cannot lend itself to recovery.<sup>13</sup>

The doctrine of assumption of risk is perhaps the strongest protection for the physical aggression and contact that is inherent to competitive sports. Often used to insulate defendants in negligence actions, this doctrine can be defined as the voluntary assumption, either express or implied, of a known and appreciated risk.<sup>14</sup> In the context of sports, however, assumption of risk also provides a pertinent application in actions for intentional torts.<sup>15</sup> When defining the contact that an athlete consents to, the doctrine of assumption of risk prescribes that no

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<sup>10</sup> WALTER T. CHAMPION, SPORTS LAW IN A NUTSHELL 144 (4th ed. 2009).

<sup>11</sup> 166 N.E. 173 (N.Y. 1929). In *Murphy*, Cardozo and the Court of Appeals of New York held that a visitor injured on a ride at an amusement park could not recover for injuries as against the amusement park because the dangers, although perilous to life and limb, were obvious and generally foreseeable to all visitors, and, therefore, the risks associated with riding the attraction were assumed. *Id.* at 174.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (“One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary . . .”).

<sup>14</sup> RESTATEMENT (SECOND) OF TORTS § 496A (AM. LAW INST. 1965).

<sup>15</sup> See generally *id.* § 50.

liability will result from acts that are customary and legal in that particular activity or game.<sup>16</sup> In essence, an athlete who assumes the ordinary risks inherent in their respective sport cannot recover for injuries that result from those risks.<sup>17</sup>

Unlike the finite boundaries of a playing field, the application of this doctrine is as diverse as the terrain upon which athletes play. Sports are played on grass, turf, ice, and hardwood, among others. Athletes are required to wear full body protective equipment, partial protection, or none at all. Sports are governed by different rules, guidelines, and customs. To account for this extreme variance, courts appropriately define the risks assumed by athletes quite narrowly, dependent upon the sport.

The ordinary risks of playing a specific sport are not spelled out explicitly in a league charter, nor are they found in a dictionary or encyclopedia. The risks are defined by judicial decisions, on a case-by-case basis.<sup>18</sup> One external source of guidance frequently referenced by the courts in New York State<sup>19</sup> is the Pattern Jury Instructions ("PJI"),<sup>20</sup> which compiles case law that explores the outer boundaries of which risks are deemed

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<sup>16</sup> *Id.* cmt. b (providing that "[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages.").

<sup>17</sup> See CHAMPION, *supra* note 10, at 225.

<sup>18</sup> See *id.* at 145–46. Some material factors that courts use to determine if a risk is inherent to a sport are: the nature of the game being played; the participants' status as either amateurs or professionals; the presence or absence of protective uniforms or equipment; and the degree of contact or enthusiasm with which the game is customarily played.

<sup>19</sup> New York State is one jurisdiction likely to hear hypothetical litigation brought by professional athletes, as New York City is the location of league headquarters for each of "The Big Four" sports: Major League Baseball ("MLB"), the National Football League ("NFL"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL").

<sup>20</sup> New York State's Pattern Jury Instructions ("PJI") is a source utilized in state tort actions, and will be discussed at length in this Note. However, as tort law is uniquely state specific, actions in tort that arise in other jurisdictions may define the risks assumed in each sport differently. For example, the State of California's jury instruction, the California Civil Jury Instructions ("C.A.C.I."), does not spell out the specific risks inherent to each sport, and merely uses case law to provide blanket guidelines of what dangers may be reasonable and unreasonable to foresee. JUDICIAL COUNCIL OF CAL. CIVIL JURY INSTRUCTION, 408 PRIMARY ASSUMPTION OF RISK—LIABILITY OF COPARTICIPANT IN SPORT OR OTHER RECREATIONAL ACTIVITY (2013) [hereinafter C.A.C.I.].

to be more “inherent” to the game than others.<sup>21</sup> For example, courts largely recognize the inherent risk of injury in competitive team sports, particularly football.<sup>22</sup> In sports that are generally more contact-heavy,<sup>23</sup> fast-moving,<sup>24</sup> or perilous in nature,<sup>25</sup> a higher risk is assumed, and therefore, recovery will be more challenging. The PJI contemplates the risks assumed in both popular recreational sports, such as basketball,<sup>26</sup> as well as sports played on more unique surfaces, such as white water rafting,<sup>27</sup> dance,<sup>28</sup> and bobsledding.<sup>29</sup> The Pattern Jury Instructions also delve into the doctrine of assumption of risk through the lens of injuries to the sports spectator,<sup>30</sup> a topic that has drawn a lot of attention in the media in the wake of recent graphic injuries to spectators, most recently to a woman struck by shards of a broken bat at Fenway Park in June 2015.<sup>31</sup> Most

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<sup>21</sup> See generally COMM. ON PATTERN JURY INSTRUCTIONS, ASS’N OF SUPREME COURT JUSTICES, NEW YORK PATTERN JURY INSTRUCTION: CIVIL 2:55 (2015) [hereinafter N.Y.P.J.I.]

<sup>22</sup> *Id.*; Benitez v. N.Y.C. Bd. of Educ., 541 N.E.2d 29, 34 (N.Y. 1989).

<sup>23</sup> See, e.g., Filippazzo v. Kormoski, 905 N.Y.S.2d, 276, 276 (N.Y. App. Div. 2010) (holding that an experienced hockey player may assume the risk of injury from a “charge” or “cross-check” committed by another player within a game or practice).

<sup>24</sup> See Charles v. Uniondale Sch. Dist. Bd. of Educ., 937 N.Y.S.2d 275, 277 (N.Y. App. Div. 2012) (holding that a player being struck by a quickly passed lacrosse ball is a risk that is assumed by the participant).

<sup>25</sup> See Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986) (explaining about when Ron Turcotte, former jockey for Triple Crown winning horse Secretariat, was barred from recovery when he fell from the horse he was riding at Belmont Park, leaving him a paraplegic); see also Kinara v. Jamaica Bay Riding Acad., Inc., 793 N.Y.S.2d 636, 636 (N.Y. App. Div. 2004) (granting summary judgment to defendant riding academy as against plaintiff, a horseback rider with 15 years of experience). In *Kinara*, the court held that a horse kicking or acting in a “wild” manner may be unforeseeable to a new rider, but to plaintiff, it should have been inherent, usual, and ordinary. 793 N.Y.S.2d at 636.

<sup>26</sup> See, e.g., Steward v. Clarkstown, 638 N.Y.S.2d 125, 126 (N.Y. App. Div. 1996).

<sup>27</sup> See Loney v. Adirondack River Outfitters, Inc., 762 N.Y.S.2d 555, 555 (N.Y. App. Div. 2003).

<sup>28</sup> See LaFond v. Star Time Dance & Performing Arts Ctr., 719 N.Y.S.2d 273, 273 (N.Y. App. Div. 2001).

<sup>29</sup> See Morgan v. State, 685 N.E.2d 202, 209 (N.Y. 1997).

<sup>30</sup> See N.Y.P.J.I., *supra* note 21 (providing that “spectators generally will be held to have assumed the risks inherent in the game, including the risk of being struck”). According to the PJI, the doctrine of assumption of risk may also apply to spectators who are also working as photographers on the sidelines at sporting events. See Bereswill v. Nat’l Basketball Ass’n, 719 N.Y.S.2d 231, 231–32 (N.Y. App. Div. 2001).

<sup>31</sup> See John Waller, *Woman Hit by Bat at Red Sox Game Remains in Serious Condition*, BOSTON.COM (June 5, 2015), <https://www.boston.com/news/local-news/2015/06/05/woman-hit-by-bat-at-red-sox-game-remains-in-serious-condition>. In addition, a nationwide class-action lawsuit was filed in July 2015 on behalf of



important to the analysis of the Ruben Tejada and Chase Utley collision is the distinction established by courts between amateur or recreational athletes, and professional athletes.<sup>32</sup>

While assumption of risk is a well-developed doctrine within the context of amateur sports and recreational pick-up games, the doctrine is not nearly as explored in the arena of professional sports. Assumption of risk in professional baseball makes for a curious case study. Whereas other sports can be easily compartmentalized into “contact”<sup>33</sup> and “noncontact” sports, baseball appears to straddle the defining line between the two labels. In football, tackling is expected to happen multiple times during a game. It is the reason the defense is on the field. In basketball, contact between players occurs virtually every time a player makes a move to the basket, or goes up for a shot, but the goal is to block the shot, not tackle the player. In hockey, one cannot go more than one or two minutes of play without seeing a player being checked against the boards. In the other American professional sports leagues, contact between opposing players is not just likely behavior; it is behavior expected of professional athletes being paid to play the game in a certain way. In football, the contact that will occur on each play will vary in degree; in baseball, the contact will vary in kind altogether. Contact in baseball occurs with much less frequency, which makes an analysis of the risks assumed within the sport much more nuanced and harder to anticipate or define.

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injured baseball spectators against MLB. Class Action Complaint at 1, *Payne v. Comm’r. of Baseball*, 2016 WL 1394369 (N.D. Cal. Apr. 8, 2016) (No. 15-CV-03229-YGR). The action is challenging the validity of “The Baseball Rule,” a legal doctrine underpinning the common warnings on baseball tickets and stadium seats that acts as a safe harbor for ballpark operators and team owners, so long as protective screens shield the area behind home plate. See Craig Calcaterra, *A Class-Action Law Suit Was Filed Against MLB Today Seeking the Installation of More Protective Netting*, NBCSPORTS (Jul. 13, 2015, 3:16 PM), <http://mlb.nbcsports.com/2015/07/13/a-class-action-law-suit-was-filed-against-mlb-today-seeking-the-installation-of-more-netting>.

<sup>32</sup> See N.Y.P.J.I., *supra* note 21. In *Trupia ex rel. Trupia v. Lake George Central School District*, the Court of Appeals further distinguished between “horseplay,” occurring not within the purview of an organized sport, and activity that takes place at designated areas and in an organized recreational forum or league, limiting the applicability of assumption of risk to situations that satisfy requirements of the latter. 927 N.E.2d 547, 549–50 (N.Y. 2010).

<sup>33</sup> Contact sports are different from other sports in regards to potential for recovery in tort. In inherently contact-ridden sports, a certain amount of contact is not only expected, but is sometimes required to keep oneself safe during the game, such as tackling in football. CHAMPION, *supra* note 10, at 150.

Above, this Note explored some factors that courts utilize to differentiate between what dangers are reasonable and inherent to a sport, and what dangers cross the line into unusual and not-consented-to dangers.<sup>34</sup> One of those factors is the respective skill level of the players and knowledge of the game. In the collision at issue, as professional athletes, Chase Utley and Ruben Tejada are more than merely aware of the rules of the game; presumably, they are paid in part for their ability to play the game within those very rules. Another factor to consider is the presence—or absence of—protective uniforms or equipment.<sup>35</sup> Baseball players are not mandated to wear any protective equipment, except helmets when they are batting or running the bases.<sup>36</sup> The only protective equipment that fielders typically choose to wear are a fielding mitt and athletic cup, although MLB rules permit for the use of other types of protection, such as helmets.<sup>37</sup> The explanation for the long-standing tradition of sparse equipment usage in baseball likely derives from decades gone by, where batters were not even required to use batting helmets.<sup>38</sup> Additionally, the inconsistency with which contact occurs between players during games makes the addition of more protective equipment impracticable and almost excessive. In the case of the Utley-Tejada collision, equipment would unlikely play any role in imposition or absolution of liability under the doctrine of assumption of risk.

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<sup>34</sup> See *supra* notes 22–24 and accompanying text.

<sup>35</sup> See *id.*

<sup>36</sup> 2016 MLB RULES, *supra* note 7, at 9, R. 3.08(a).

<sup>37</sup> *Id.* at 8, R. 3.06. The only defensive player required to wear more than just the mitt is the catcher, who is required to wear a protective helmet and face mask while behind the plate. *Id.* at 9, R. 3.08(d). Nowhere in the safety rules are catchers mandated to wear full-body pads, as all catchers customarily do.

<sup>38</sup> Even though the first helmets were developed and worn in MLB contests during the early 1900's, MLB batters were not required to wear helmets until 1971. *Batting Helmet*, BASEBALL-REFERENCE.COM, [http://www.baseball-reference.com/bullpen/Batting\\_helmet](http://www.baseball-reference.com/bullpen/Batting_helmet) (last visited Jan. 11, 2017). Even though this was a safety concern, veteran players were given the option whether to wear one. The last MLB player to bat without a helmet was Bob Montgomery in 1979. This is just one example of when baseball chose not to take a definitive stand between player safety and tradition. More recently, in 1983, batters were required to wear a helmet with a single earflap, although veterans were again given the option to wear helmets without earflaps. In 2002, almost twenty years after this safety precaution was introduced to Major League Baseball, Tim Lincecum was the last player to wear a batting helmet without earflaps. *Id.*

However, case law has made clear the fact that the playing conditions of a field or arena may also impact whether or not a plaintiff has assumed a risk within the game, particularly in baseball or softball.<sup>39</sup> In *Maddox v. City of New York*, a professional baseball player, Elliott Maddox, of MLB's New York Yankees, was injured when he fell on a wet and muddy field at Shea Stadium.<sup>40</sup> Maddox brought an action against the City of New York; his employer, the Yankees; the umpires of the game in question; the stadium owner; the stadium builder; and the field maintenance company, which regularly oversaw stadium conditions.<sup>41</sup> The Court affirmed the lower court's grant of summary judgment in favor of all defendants, holding that Maddox assumed the risk of playing baseball on a washed out field, largely because he had admitted multiple times to knowing that the field was wet and muddy.<sup>42</sup>

An analysis of the risks assumed within the purview of the Utley and Tejada incident has nothing to do with knowledge of field conditions, or knowledge of weather patterns. However, the holding in *Maddox* does raise the question: should an injured player's knowledge of other circumstances—such as an opposing player's aggressive base-running tendencies, or league reputation as a “dirty player”—impact the court's analysis of what risks he assumed or did not assume?

As a seasoned major league shortstop, Tejada undoubtedly understood the risk that a runner sliding into second base may contact him. Furthermore, given that the game in question was being played in October, amidst high stakes playoff action, Tejada most likely could have reasonably anticipated that a runner would try to break up a play at second base. Moreover, he was no stranger to meeting Chase Utley at second base in a tumultuous collision. In September 2010, Utley slid questionably

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<sup>39</sup> See *Maddox v. City of New York*, 487 N.E.2d 553, 554 (N.Y. 1985) (deciding a case in which a professional baseball player was injured on slippery field); *Bukowski v. Clarkson Univ.*, 971 N.E.2d 849, 851 (N.Y. 2012) (stating that a college baseball player assumes the risks involving “less than optimal [playing] conditions”).

<sup>40</sup> 487 N.E.2d at 554. The New York Yankees were playing their home games at Shea Stadium in Queens, New York at the time of this incident because of construction that was taking place at Yankee Stadium in the Bronx, New York. The court held that Shea Stadium not being Maddox's actual home field was immaterial to his claim. *Id.* at at 557.

<sup>41</sup> *Id.* at 554.

<sup>42</sup> *Id.*

late into second base in an attempt to break up a double play in the fifth inning of a game between Tejada's New York Mets and Utley's then-team, the Philadelphia Phillies.<sup>43</sup> Although Tejada was not seriously injured, Utley's slide initiated away from the bag and was the subject of attention and discussion from Tejada's teammates and the media.<sup>44</sup> Arguably, the two players' prior interaction in 2010 may have made Utley's October 2015 slide more foreseeable to Tejada or more predictable from Utley.

There is a dearth of case law governing if and when situational awareness can be a factor in assessing what risks were and were not assumed.<sup>45</sup> If specific knowledge of an in-game situation was to be adopted by courts as a factor to consider in assessing assumption of risk, it would likely open the door to a barrage of superfluous litigation, with defendants relying upon situational justifications or artificial correlations to absolve themselves of liability, even in the face of specifically egregious on-field behavior. This possibility exposes the fragility and ambiguity that accompany application of the doctrine of assumption of the risk in professional sports, and why the doctrine, "once an impenetrable and monolithic defense,"<sup>46</sup> has evolved in recent decades to allow for recovery in specific situations.<sup>47</sup> The United States Court of Appeals for the Tenth

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<sup>43</sup> James Collier, *Utley, Tejada Have Collided in the Past*, MLB.COM (Oct. 11, 2015), <http://m.mlb.com/news/article/154045840/chase-utley-ruben-tejada-had-past-collision>.

<sup>44</sup> Mets captain David Wright said of the incident, "Chase plays the game hard . . . He plays the game passionately. But there's a thin line between going out there and playing the game hard and going out there and trying to get somebody hurt." *Id.*

<sup>45</sup> Knowledge needs to be particularized on the scope and magnitude of the risks, and "may be inferred from the circumstances." CHAMPION, *supra* note 10, at 227. There must be a knowing assumption of risk, meaning that the plaintiff has actual knowledge of the risk involved, or the knowledge is imputed because of certain observations, from which he or she should have reasonably known that the risk was involved. *Id.* at 227–28. However, it remains to be seen whether or not a specific in-game situation is included in the scope of a risk.

<sup>46</sup> *Id.* at 226.

<sup>47</sup> For example, recovery is now available for injuries that result from safety violations. See *supra* Section I.A, for a discussion on assumption of risk in sports by way of the Restatement. Recovery is available for the reckless intentional misconduct of another participant. See *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986). Further, recovery may also be available due to the negligence of third parties, including coaches or referees. CHAMPION, *supra* note 10, at 227–28.

Circuit's landmark decision, *Hackbart v. Cincinnati Bengals, Inc.*,<sup>48</sup> sparked the changing application of the assumption of risk doctrine.

## II. HACKBART AND MODERN-DAY APPLICATION

The prevailing judicial attitudes toward tort liability in professional sports have a firm foundation in the landmark case of *Hackbart v. Cincinnati Bengals, Inc.*<sup>49</sup> Prior to *Hackbart*, recovery for participant injuries was extremely unusual in professional contact sports.

The action in *Hackbart* arose during a preseason game between the NFL's Cincinnati Bengals and Denver Broncos.<sup>50</sup> The plaintiff, Dale Hackbart, was a defensive player for the Broncos, when he was injured by Bengals' offensive player Charles "Booby" Clark, who, admittedly, out of anger and frustration, due to a Bengals interception, elbowed a kneeling Hackbart on the back of the head.<sup>51</sup> Because the contact occurred on the side of the field opposite from the action of the game, no official saw the hit and, therefore, no penalty was called.<sup>52</sup>

After the game, Hackbart experienced stiffness and pain in his neck and back, and played only two regular season games before being released by the Broncos.<sup>53</sup> He sought medical attention after his release, whereupon it was discovered that Hackbart had a severe fracture of three vertebrae in his neck.<sup>54</sup> Hackbart sued both Clark and the Cincinnati Bengals on two claims, one of negligence and the other of reckless misconduct.<sup>55</sup>

As a matter of law, the trial court ruled that tort liability does not apply to conduct during a professional football game.<sup>56</sup> The court further held that there could be no real duty of care among participants in a professional football game, because the

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<sup>48</sup> 601 F.2d 516 (10th Cir. 1979).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 518.

<sup>51</sup> *Id.* at 519.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

core purpose of the sport is the infliction of violence upon opposing players.<sup>57</sup> Hackbart appealed the decision to the United States Court of Appeals for the Tenth Circuit in 1978.

### A. *The Tenth Circuit Decision*

The Tenth Circuit reversed the trial court's decision, ushering in a new era of tort liability. The court held that a professional football player may state a claim in tort as against an opponent.<sup>58</sup> The court held that Clark acted impulsively and inappropriately in intentionally striking Hackbart in the back of the head.<sup>59</sup> This holding thus confirmed that there is a duty of care in professional sports, evidenced by the rules and regulations of the game that were explicitly enacted to promote player safety.<sup>60</sup> To not impose a duty of care, the court held, would be to admit that the only available option left to the injured player would be retaliation.<sup>61</sup>

The court, without deciding the issue,<sup>62</sup> also expressed doubt as to whether the doctrine of assumption of risk should have absolved the Cincinnati Bengals of liability at all.<sup>63</sup> The court stated, "it is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and there is no evidence which we have seen which shows this."<sup>64</sup> This holding was a breakthrough for the

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<sup>57</sup> *Id.* Alternatively, the court also declared in dicta that even if some minimal duty of care was imposed in the context of the sport, recovery for a claim would still be defeated by the defense of assumption of risk. *Id.*

<sup>58</sup> *Id.* at 524.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 521 ("Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another.").

<sup>61</sup> *Id.* Retaliation would lead sports violence even further afield from control or oversight. *Id.*; see also ROGER I. ABRAMS, SPORTS JUSTICE 129 (2010) (discussing the aftermath of the brutal injury professional hockey player Ted Green of the Boston Bruins suffered when St. Louis Blues player Wayne Maki struck him in the head with his stick: "[r]evenge, if it was to come, would be done on the ice").

<sup>62</sup> Before the case was retried on the issue of assumption of risk, Hackbart reached a settlement agreement with the Cincinnati Bengals. *Hackbart in Settlement with Bengals on Injury*, N.Y. TIMES: SPORTS (Jul. 5, 1981), <http://www.nytimes.com/1981/07/05/sports/hackbart-in-settlement-with-bengals-on-injury.html>.

<sup>63</sup> *Hackbart*, 601 F.2d at 520. The court rejected a broad and unyielding application of the doctrine of assumption of risk, choosing to distinguish between all risks that arise in the playing of a sport and risks that unquestionably are "part of the game." *Id.* at 520–21.

<sup>64</sup> *Id.* at 520.

entire body of tort law in the context of professional sports, as historically participants could not recover for injuries that occurred on the playing field.<sup>65</sup>

### B. *Establishing & Refuting Battery: Applying Hackbart*

Although the action in *Hackbart* was steeped in questions of negligence and reckless misconduct, the court's holding did not limit its reach to unintentional torts, which opened the door for potential liability in intentional torts—for example, battery—as against co-participants.<sup>66</sup> To have a claim for battery in New York, a plaintiff must prove that: (1) the defendant intended to make bodily contact with him or her, and (2) the plaintiff suffered a bodily contact that was harmful or offensive, which was imposed without the plaintiff's consent.<sup>67</sup> In civil battery,<sup>68</sup>

<sup>65</sup> CHAMPION, *supra* note 10, at 144.

<sup>66</sup> The Tenth Circuit holding in *Hackbart* has subsequently been adopted by the majority of jurisdictions, including in New York, as the decision from 1979 is still frequently cited to in tort cases involving assumption of risk, particularly for personal injuries arising out of participation in sports or similar recreational activities. This is because the landmark *Hackbart* decision marked the first time tortious liability was imposed and the potential for recovery was contemplated by courts in favor of injured athletes, professional and amateur alike.

<sup>67</sup> See, e.g., *Jeffreys v. Griffin*, 801 N.E.2d 404, 409 n.2 (2003); *Armstrong v. Brookdale Univ. Hosp. & Med. Ctr.*, 425 F.3d 126, 134 (2d Cir. 2005); *Naughtright v. Weiss*, 826 F. Supp. 2d 676, 685 (S.D.N.Y. 2011).

<sup>68</sup> Battery is a term that has use in both the civil and criminal realms, but it is easier to prove in the civil realm due to the question of intent. In the criminal realm, the requirements of battery prescribe that the defendant must intend both the contact and the resultant harm. See generally LINDA JEAN CARPENTER, *LEGAL CONCEPTS IN SPORT: A PRIMER* 99–100 (2d ed. 2000). The question of intent to harm is a question of particular ambiguity, especially in the context of sports injuries. For example, in the aftermath of the Tejada injury, players, coaches, and league officials spoke out to question the motives of Utley's slide, but largely stated that they believed Utley's intent was not to injure Tejada. See Mark Saxon, *Chase Utley Suspended for 2 Games for Slide into Reuben Tejada*, *Will Appeal*, ESPN (Oct. 12, 2015), [http://espn.go.com/mlb/playoffs2015/story/\\_id/13866872/chase-utley-suspended-2-games-slide-broke-ruben-tejada-leg](http://espn.go.com/mlb/playoffs2015/story/_id/13866872/chase-utley-suspended-2-games-slide-broke-ruben-tejada-leg) (quoting Joe Torre, who stated his sincere belief that Utley did not intend to inflict any serious injury). The grey area will always exist where players intend contact and are acting aggressively within rules and customs of the game. However, more egregious conduct may make a clearer showing for the intent to harm required for criminal battery. One of the most famous examples of this type of conduct occurred in an NBA game between the Houston Rockets and the Los Angeles Lakers in 1977, when Laker Kermit Washington punched Rocket Rudy Tomjanovich in the face, leaving him motionless in a pool of blood in front of thousands of fans. *Tomjanovich v. California Sports, Inc.*, No. H-78-243, 1979 WL 210977 (S.D. Tex. Oct. 10, 1979). As a result, Tomjanovich suffered a broken nose and jaw, a fractured skull, facial lacerations, a concussion, and leakage

there is no requirement in New York that the contact was intended to cause harm; the contact must merely be unconsented to, and offensive or harmful.<sup>69</sup>

For purposes of hypothetical litigation, Chase Utley's slide into Ruben Tejada likely could satisfy the elements of civil battery in New York. Utley, in sliding near a base where Tejada was firmly planted, intended to make contact. Utley made hard contact with Tejada's entire lower body, leading to an inference that the contact was intended, and not incidental. Second, the contact resulting from Utley's slide was clearly harmful, as Tejada was left with a broken leg and was unable to play for the remainder of the 2015 season. The lingering question is that of consent. In standing at second base while waiting for the throw from second baseman Daniel Murphy, did Ruben Tejada consent to the contact imposed by Utley's slide?

The intentional tort of battery is usually found in situations where the conduct departs from fair play, and enters a more violent level.<sup>70</sup> However, the distinction between the two realms is a blurry one—what some would call a “part of the game,” others would call an act of violence.<sup>71</sup> The issue of consent for purposes of the Utley slide, and in other similarly grey areas, is a challenging distinction for courts to make, and is largely guided by the concepts first introduced by the court in *Hackbart*.

The *Hackbart* court's emphasis—but not sole reliance<sup>72</sup>—on Clark's violation of a league safety rule insinuates that certain on-field conduct will not be accepted as “part of the game,” and, in turn, can be actionable in court.<sup>73</sup> Of course, the holding in

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of spinal fluid. Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for On-The-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266, 276 n.55 (1999). Washington was fined \$10,000 and suspended for sixty days, but no criminal charges were ever filed. *Id.* at 276.

<sup>69</sup> *Jeffreys*, 801 N.E.2d at 409 n.2.

<sup>70</sup> CARPENTER, *supra* note 68, at 99.

<sup>71</sup> *Id.* at 100.

<sup>72</sup> See *supra* note 63 and accompanying text. The court's use of the “part of the game” test to determine a particular athlete's assumption of risk infers that certain violations of rules can occur without being actionable in the judicial system. Such violations include those that are “frequent and foreseeable” and would potentially bar a plaintiff from any recovery. See Neil R. Tucker, Comment, *Assumption of Risk and Vicarious Liability in Personal Injury Actions Brought by Professional Athletes*, 4 DUKE L.J. 724, 754 (1980).

<sup>73</sup> See Courtlyn Roser-Jones, *A Costly Turnover: Why the NFL's Bounty Scandal Could Change the Current Legal Standard of Deferring to Internal Disciplinary Sanctions in Instances of Game-Related Violence*, 20 SPORTS LAW. J. 93, 108 (2013).



*Hackbart* was not intended to grant *carte blanche* to all plaintiff athletes wishing to recover for injuries.<sup>74</sup> Even if all the elements required for an action in battery are satisfied, recovery may not be had if the conduct is categorized as merely within the usual risks assumed by an athlete in their respective sport. The authority for the duty of care imposed upon co-participants<sup>75</sup> in a sport, as in *Hackbart*, turns on the issue of consent, which is addressed in a comment to the Restatement (Second) of Torts § 50.<sup>76</sup> Therefore, it is appropriate to utilize the elements spelled out in that provision to guide any analysis of a plaintiff's potential for recovery.

### 1. Consent

As discussed above, the Restatement (Second) of Torts explores assumption of risk in the context of taking part in a game.<sup>77</sup> This provision defines the risks assumed as those "bodily contacts or restrictions of liberty" permitted by a game's rules or usages.<sup>78</sup> Conversely, participating in such a game does not manifest consent to contacts that are prohibited by rules of the game if those rules are designed to protect the participants.<sup>79</sup> Such safety rules can be differentiated from rules utilized to secure "the better playing of the game as a test of skill."<sup>80</sup> According to the Restatement, risks arising from the violation of a safety rule can impose liability even if the injured player has knowledge that those with or against whom he is playing are "habitual violators" of such rules.<sup>81</sup>

Athletes, such as Ruben Tejada, who are involved in sports with habitual or incidental contact, do not automatically consent to contact prohibited by the rules or customs of the game if those rules were designed for protection, rather than control of the mode of play.<sup>82</sup> The rule that MLB says that Utley violated, Rule

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<sup>74</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979).

<sup>75</sup> *Id.*

<sup>76</sup> RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (AM. LAW INST. 1965).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* For example, some rules relate to the progress of the game—like rules for boundaries of the field, foul ball, etc.—and others are clearly created to ensure player safety—like penalties for high-sticking in hockey. See generally CARPENTER, *supra* note 68, at 100.

<sup>81</sup> RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (AM. LAW INST. 1965).

<sup>82</sup> *Id.*; see also CHAMPION, *supra* note 10, at 228.

5.09(a)(13) of the 2015 Official Rules of Major League Baseball,<sup>83</sup> specifically mentioned the objective of the rule is to penalize an offensive player for deliberately trying to crash into the defensive player at a base, rather than trying to reach the base.<sup>84</sup> The rule was clearly put in place to ensure the safety of players. Utley did not slide into second, colliding with Tejada, in a mere effort to reach base safely. In fact, Utley was likely going to be called out at second, had he not collided with Tejada so hard, as to knock the ball out of his glove. Therefore, it is likely that Chase Utley, in violating Rule 5.09(a)(13) of the then-current rules, initiated contact with Ruben Tejada that was not consented to, pursuant to the concept of assumption of risk.

## 2. Customs/Rules

The Restatement (Second) of Torts utilizes the normal rules and customs of a game to create the limitations of what is—and is not—a “part of the game.”<sup>85</sup> After Tejada’s injury, many speculated that the committee governing the official rules of baseball would revise Rule 5.09 on contact between a sliding base runner and a fielder.<sup>86</sup> However, others postulated that, although the injury to Tejada was worrisome, the customs of baseball have long held that sliding into a base to break up a play was legal and encouraged.<sup>87</sup>

In baseball, there is a curious conflict between the express rules of the game and the long-standing customs and traditions of America’s pastime. Baseball is a game rooted in tradition and unspoken custom, from the seventh-inning stretch, to retaliation after a player appears to be intentionally hit by a pitch.<sup>88</sup> To those who love the game, baseball is a stalwart sport in an era characterized by other professional sports leagues that are gratuitously progressive, and too hasty to cater to the rapidly

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<sup>83</sup> 2015 MLB RULES, *supra* note 4, at 42, R. 5.09(a)(13).

<sup>84</sup> *See id.* at 43, R. 5.09(a)(13) cmt.

<sup>85</sup> RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (AM. LAW INST. 1965).

<sup>86</sup> *See, e.g.,* Tyler Kepner, *It’s Unsafe at Second, and Some Want New Rules for Slides*, N.Y. TIMES (Oct. 11, 2015), <http://www.nytimes.com/2015/10/12/sports/baseball/its-unsafe-at-second-and-some-want-new-rules-for-slides.html>.

<sup>87</sup> *See* Sherman, *supra* note 2 (stating that players have been in violation of that rule for years, and the vast majority avoid suspension likely because the resulting injury in Tejada’s case was far more jarring, thus prompting a swift and decisive response from MLB officials).

<sup>88</sup> *See* JEROLD J. DUQUETTE, REGULATING THE NATIONAL PASTIME 62 (1999).

evolving needs and demands of a changing fan demographic in a new era.<sup>89</sup> To others, baseball is too slow-moving, and cannot keep up with a changing society, and is losing popularity because of it.<sup>90</sup>

The debate on this topic is relevant insofar as it applies to MLB's adoption and revision of the rules of baseball, regarding player safety. Nowhere is the symbiotic relationship between the customs and the rules of the game more evident than in the events that occurred as a result of a 2011 injury to San Francisco Giants catcher Buster Posey.

Posey, a young star for the Giants at the time, was behind the plate during the 12th inning of a game against the Florida Marlins, when he absorbed a tough collision at home plate with a base runner.<sup>91</sup> As a result, Posey sustained a broken bone in his lower left leg and a torn ligament in his left ankle.<sup>92</sup> No Giants players accused the base runner of intentionally trying to injure Posey, and the debate on the legality and intention of the play was not nearly as intense as in the case of the Ruben Tejada collision.<sup>93</sup> However, Giants Manager Bruce Bochy, in reaction to the injury, responded by saying, "I understand that guys run into catchers. I do think we need to consider changing the rules here a little bit because catchers are so vulnerable."<sup>94</sup>

Bochy was correct; base runners had been colliding with catchers for decades. One of the most indelible collisions occurred in the MLB All-Star Game on July 17, 1970 in Cincinnati, when the boisterous star Pete Rose collided dramatically with catcher Ray Fosse at home plate.<sup>95</sup> Instead of sliding into the plate, Rose crashed headfirst into Fosse, sending the catcher into a backwards somersault as the ball rolled away

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<sup>89</sup> See generally THE POLITICS OF BASEBALL: ESSAYS ON THE PASTIME AND POWER AT HOME AND ABROAD (Ron Briley ed., 2010).

<sup>90</sup> However, MLB has recently adopted new technology and processes to attempt to combat these complaints, including the adoption of instant replay capabilities during the 2014 season, and the installation of timers to speed up the time between innings. Some argue that these changes occurred far long after the need arose.

<sup>91</sup> Chris Haft, *Surgery Likely for Posey's Torn Ankle Ligaments*, MLB.COM (May 26, 2011), <http://m.mlb.com/news/article/19599270>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See *Rose and Fosse Collide*, MLB.TV (July 27, 2009), <http://m.mlb.com/video/topic/6479266/v5766041/rose-crashes-into-fosse-at-the-plate>.

and out of reach.<sup>96</sup> Pete Rose was safe at home.<sup>97</sup> The National League team<sup>98</sup> was the walk-off winner in a final score of 5-4. The crowd in Rose's hometown ballpark roared. Fosse remained on the ground, dazed and writhing in pain.<sup>99</sup> Fosse played the majority of the balance of that 1970 season, but his performance was clearly diminished.<sup>100</sup> The following spring, doctors discovered that Fosse's left shoulder was fractured and separated in the collision, and had subsequently healed in the wrong place. Roy Fosse's baseball career was never the same.<sup>101</sup>

The contact at the plate sustained by Buster Posey paled in comparison to the impact that Ray Fosse absorbed. However, it was the former that provided the impetus for league-wide rule changes.<sup>102</sup> In 1970, hard collisions initiated by base runners with the objective of breaking up a play were customary—acceptable traditional conduct by hard-nosed baseball players. In 2011, the traditional customs tolerating such conduct began to erode. The evolution of the MLB response in 2011 can likely be

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Interestingly enough, MLB's Chief Baseball Officer—and so-called “rules czar”—Joe Torre was a member of the winning National League squad and committed the first out of the 12th inning.

<sup>99</sup> *See Rose and Fosse Collide*, *supra* note 95.

<sup>100</sup> Fosse, usually a consistent offensive threat, had only two home runs and 16 RBI's in the second half of the season. *See Ray Fosse*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/f/fossera01.shtml> (last visited Jan. 11, 2017).

<sup>101</sup> Scott Miller, *Fosse Still Aching, but Not Bitter 43 Years After All-Star Game Collision*, CBSSPORTS.COM (July 11, 2013), <http://www.cbssports.com/mlb/writer/scott-miller/22721779/fosse-still-aching-but-not-bitter-43-years-after-all-star-game-collision>.

<sup>102</sup> In 2014, a new rule governing collisions at home plate—referred to as “The Buster Posey Rule”—was implemented. 2016 MLB RULES, *supra* note 7, at 69–70, R. 6.01(i). This rule explicitly eliminates the malicious collision, and analyzes the intent of the runner by their shoulder and overall body positioning upon approach to home plate. *Id.*

explained by a widespread fear of concussions and chronic traumatic encephalopathy,<sup>103</sup> as well as broadly evolving views on collisions by baseball players, coaches, writers, and fans.<sup>104</sup>

### III. RECOMMENDED NEXT STEPS

The challenge faced by MLB is not how to prevent the on-field violence from occurring; rather, the question is how to create proper controls that will consistently govern the aftermath of injuries sustained by such conduct. This section explores a myriad of such solutions, both internal and external.

#### A. *Using Tort Law*

More and more, claims of civil battery arising from sporting contests are finding their way to court.<sup>105</sup> This recent shift toward the use of the courts by professional athletes is new,<sup>106</sup> as athletes have historically been reluctant to bring such suits against one another.<sup>107</sup> Recently, however, athletes have begun to appreciate the judicial system for its primary function: to resolve disputes.

Inconsistent judicial outcomes, however, spawn major criticism of utilizing the court system to resolve disputes arising from professional sports injuries.<sup>108</sup> As discussed throughout this

<sup>103</sup> Spurred on the historic class-action lawsuit filed by former NFL players against the NFL for failure to protect and warn against the risk of head injuries. This suit, the first of its kind, was settled in April 2015, with the NFL agreeing to pay out nearly \$900 million to the plaintiffs in the suit. In re Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 418 (E.D. Pa. 2015), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

<sup>104</sup> Mike Oz, *Buster Posey Reacts to Baseball's New Home Plate Collision Rule—It's a Good Rule*, YAHOO! SPORTS (Feb. 25, 2014, 1:34 PM), <http://sports.yahoo.com/blogs/mlb-big-league-stew/buster-posey-reacts-to-baseball-s-new-home-plate-collision-rule-%E2%80%94-it-s-a-good-rule-183502064.html>.

<sup>105</sup> See *supra* notes 58–60 and accompanying text (discussing the *Hackbart* decision in the Tenth Circuit).

<sup>106</sup> Tom Brady, in looking for a cancellation of his four-game suspension in light of the "Deflategate" investigation, turned to the United States District Court for the Southern District of New York to decide on the validity of this suspension. Tom Hays, *No Settlement: Goodell, Brady Await 'Deflategate' Ruling*, YAHOO! SPORTS (Aug. 31, 2015, 6:10 PM), <http://sports.yahoo.com/news/goodell-brady-due-court-deflategate-case-061455122--nfl.html>.

<sup>107</sup> Players have long been reluctant to bring charges against one another, out of fear of retaliation. See D. Stanley Eitzen, *Violence in Professional Sports and Public Policy*, in GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES 99, 109 (Arthur T. Johnson & James H. Frey eds., 1985).

<sup>108</sup> *Id.*

Note, it is a challenging task to draw a line between what is and what is not acceptable violence within the lens of a particular sport. Courts deciding civil claims are faced with this same challenge: they may use the doctrine of assumption of risk to guide their analyses, but it is far from an exact science.<sup>109</sup> This grey area can lead to a multiplicity of conflicting opinions and verdicts from judges and juries. However, such inconsistencies also arise in the interpretation and enforcement of rules by league officials and umpires. Further, the nature of utilizing the court system, whether it is for tortious battery claims in sports or for murder charges in the criminal courts, renders any expected outcome uncertain. To use unpredictability as an argument against utilization of the judicial system may well be shortsighted and defies the system's *raison d'être* in the first place. Sports cannot exist outside the purview of the law. As Richard Horrow succinctly stated: "Organized athletic competition does not exist in a vacuum. The operation of law does not stop at the ticket gates of any sporting event. No segment of society can be licensed to break the law with impunity."<sup>110</sup>

Professional athletes should consider turning to the courts for resolution because tort law functions to achieve a number of important purposes that may not be wholly achieved through any other proposed solution. First, tort law is aimed at effective and lasting deterrence. Successful civil actions have a lower burden than criminal suits and also give professional athletes the benefits of recovery under the doctrine of *respondeat superior* for situations where team owners or coaches violate their duty of care, resulting in injury.<sup>111</sup> Both of these elements—unique to tort law—can provide an important deterrent value in creating more tangible boundaries between punishable and nonpunishable on-field conduct.

Second, the touchstone of tort law is to make the injured party "whole." An injured party can claim damages, from nominal to compensatory, from the individual who created the harm that caused the injury. Nowhere is a similar goal even contemplated within the measures taken by professional sports leagues after a player is injured. As discussed earlier in this

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 109.

<sup>111</sup> *Id.* at 106–07; CHAMPION, *supra* note 10, at 182–83.

Note, professional athletes who are found to have violated the rules of a game may be subject to suspensions or fines.<sup>112</sup> For an injured player like Ruben Tejada, who suffered a season-ending leg injury, a hypothetical fine or suspension imposed on Chase Utley would have had no impact whatsoever, as Tejada would never see a dime of that suspension money.<sup>113</sup> Concentrating on punishment to an offending player without making reparations to the injured player wrongly shifts the focus away from the injured party, a misstep not made if pursuing recourse through tort law.<sup>114</sup>

Finally, tort law is useful in helping society draw the line between acceptable and unacceptable behavior.<sup>115</sup> The assignment of fault, as determined by a judge or jury, "is a final grade" for the behavior of a professional athlete in a particular situation.<sup>116</sup> This aspect of tort law is also beneficial because although concrete, it need not be doctrinaire. The determination of what is socially responsible is constantly evolving through an ever-expanding body of case law, which "has been drawn and redrawn over the decades."<sup>117</sup> This flexibility allows the determination of responsibility and fault to accurately reflect the current mores, effectively letting society set the standards of care.<sup>118</sup> Tort law is effective because it is a body of law that accurately reflects the people whom it will directly impact.

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<sup>112</sup> See *supra* notes 29–30 and accompanying text.

<sup>113</sup> According to former league spokesman Rich Levin, fines imposed on players go into a central pool for all thirty teams, where some of the funds may be used for charitable donations, but there are no definitive rules on what charities, and how much of the funds are donated. Darren Rovell, *A Fine Predicament for NBA?*, ESPN: NBA, <http://assets.espn.go.com/nba/s/2001/0406/1168454.html> (last visited Jan. 11, 2017).

<sup>114</sup> CARPENTER, *supra* note 68, at 38 ("We are not islands unto ourselves. Instead, we are tied to others in a complex set of relationships by which we can sometimes share pain, joy, obligations, and financial responsibility.").

<sup>115</sup> *Id.* at 37.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

### B. Legislative Action

In *Hackbart*, the court said that there are industries that are “hazardous to the health and welfare of those who are employed” in them, such as coal mining and railroading, which require rapidity and specificity of legislative action.<sup>119</sup> Does the professional sports industry fall within this description?

There are extreme dangers in some sports, specifically inherently contact-based sports such as professional football, but government intervention cannot be solely based upon the fact that participants are sometimes injured in the playing of the sport. Rather, legislative action should be based in overarching federal interests, including the interstate nature of professional sports and the heavy involvement of commerce and national media.<sup>120</sup> Further, there is a national interest to be served by proposed government intervention into the violence in professional sports.<sup>121</sup> Few can deny that a critical governmental function is to protect citizens from behavior that disrupts their rights, safety, or welfare. The question remains, however, whether this function should lead to the regulation of professional sports.<sup>122</sup>

Congress sought to answer that question in the affirmative twice in recent decades, through two proposed bills aimed at combating sports violence. The Sports Violence Act of 1980<sup>123</sup> was a proposed bill that would have imposed a uniform criminal sanction for exceptional acts of violence in sport.<sup>124</sup> However, the bill failed to gain enough support.<sup>125</sup> One major criticism was that a criminal sanction was not appropriate for sports injury, since proving criminal intent imposed a high threshold burden

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<sup>119</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 357 (D. Colo. 1979), *rev'd*, 601 F.2d 516 (10th Cir. 1979).

<sup>120</sup> Eitzen, *supra* note 107, at 109.

<sup>121</sup> *Id.* Excessive violence in sports is a serious societal problem; athletes should not be immune from the laws created to govern proper conduct in society. *Id.* at 99. Further, as professional sports are broadcast to and viewed by millions, willful acts to maim other players, if left unpunished, may glorify violence and set poor examples for those watching in the stands at the game or on the television at home. *Id.* at 100.

<sup>122</sup> *Id.*

<sup>123</sup> *Excessive Violence in Professional Sports: Hearing on H.R. 7903 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 96th Cong. 20898 (1980) (statement of Ronald M. Mottl, Member, U.S. House of Rep.).

<sup>124</sup> *Id.*; see also Eitzen, *supra* note 107, at 110.

<sup>125</sup> Eitzen, *supra* note 107, at 110.



with multiple proof problems.<sup>126</sup> Further, many saw this bill as "an unnecessary intrusion of the federal government into an area [that was] generally unregulated but [usually] able to police itself."<sup>127</sup>

Another attempt by the federal government to regulate sports violence came just three years later in the form of the Sports Violence Arbitration Act of 1983.<sup>128</sup> This proposed legislation would require each professional sports league to establish an independent arbitration panel through the collective-bargaining agreement.<sup>129</sup> Any injured player could choose to bring a grievance before this panel, and the findings of the panel would be binding.<sup>130</sup> This proposal also failed. Criticism was similar to that regarding the Sports Violence Act of 1980, and critics argued that requiring a neutral arbitration panel through collective bargaining failed to recognize the leagues' internal resistance to outside attempts at forced self-regulation.<sup>131</sup>

### C. *Internal League Controls*

Traditionally, leagues have policed themselves, giving league commissioners the power to investigate and penalize acts of violence by players through fines or suspensions.<sup>132</sup> The argument for internal control is that league officials, unlike judges and juries, have a deep understanding of the rules and customs of their sport, and are likely to know best when an aggressive act exceeds the norms.<sup>133</sup> Further, letting a league

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Hearing on H.R. 4495 Before the Subcomm. on Labor-Management Relations of the H. Comm. on the Judiciary*, 98th Cong. 34766 (1983) (statement of Thomas A. Daschle, Member, U.S. House of Rep.).

<sup>129</sup> *Id.*

<sup>130</sup> See 131 CONG. REC. E5285-01 (1985) (extension of remarks of Rep. Thomas A. Daschle); Eitzen, *supra* note 107, at 110. The act provided that if the conduct in question was found to be unnecessarily violent, outside the rules, and intentional, any of the following sanctions could result: an award of compensation paid by the employer of the violent player or the imposition of disciplinary sanctions against the offending player and his team, such as a loss of draft picks, fines, or suspension without pay. *Id.* at 110-11.

<sup>131</sup> Eitzen, *supra* note 107, at 111.

<sup>132</sup> *Id.* at 100.

<sup>133</sup> *Id.*

police itself with fines and suspensions can incentivize team ownership and coaching staffs to discourage excessive violence, so as not to put their team at a competitive disadvantage.<sup>134</sup>

Whether internal league control actually results in deterrence is questionable. Further, the attempt by leagues to deter excessively violent conduct through league-imposed fines is feeble at best. Fines assessed on professional athletes making millions of dollars a year can be considered a mere drop in the bucket, having trivial deterrent effects, if any. Often the star players are the repeat perpetrators of violent on-field conduct, receiving publicity and rich contracts for their reputation as being tough, hard-nosed players.<sup>135</sup> If the penalties imposed by leagues are essentially a slap on the wrist, to be immediately followed by rich contract extensions and praise by fans and the media, no player is likely to be deterred from acting in an aggressive way during a game.

Most significantly, the currency of a league is its commercial value, and violence is what drives that commercial value.<sup>136</sup> The media and fans sensationalize violence, specifically conduct that is linked to heroic, game-saving or game-altering action.<sup>137</sup> Winning is the standard upon which teams or coaches are evaluated, so “the means to achieve that end become less scrutinized.”<sup>138</sup> Leagues can thus tout their player safety initiatives all they please, but lasting solutions to excessive violence will not be forthcoming, as the incentives for players, coaches, owners, and leagues will serve to encourage, rather than minimize, violence.

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<sup>134</sup> *Id.* at 102. (offering potential sanctions for team, player, and coach could have a better deterrent effect, would discourage intimidation, or the hiring and using of players in “enforcer” roles).

<sup>135</sup> NFL star Ndamukong Suh has had repeat violent incidents leading to fines and suspensions. Dave Birkett, *Lions Star Ndamukong Suh: A History in Discipline*, DETROIT FREE PRESS: SPORTS (Dec. 29, 2014, 8:14 PM), <http://www.freep.com/story/sports/nfl/lions/2014/12/29/ndamukong-suh-fine-history/21025507>. Suh’s reputation as an aggressive player rewarded him a multimillion dollar contract deal with the Miami Dolphins in the 2015 off-season, making him the highest-paid defensive player in NFL history. Kevin Patra, *Ndamukong Suh, Miami Dolphins Strike Mega Deal*, NFL (Mar. 11, 2015, 3:29 PM), <http://www.nfl.com/news/story/0ap3000000477761/article/ndamukong-suh-miami-dolphins-strike-mega-deal>.

<sup>136</sup> Eitzen, *supra* note 107, at 104.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (quoting RICHARD HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 38–39 (1980)).

#### D. *Final Recommendation*

Tort law provides the most thorough avenue to pursue recourse, and players have demonstrated a recent trend toward utilization of the courts, making an influx of civil suits against leagues, teams, and players a palpable reality. But the most thorough solution may not necessarily be the most effective one. If sports leagues wish to insulate themselves from expending resources in defense of civil suits, another viable option may exist. MLB took good first steps to protect the league, and to simultaneously emphasize the importance of player safety in baseball collisions, such as the one between Ruben Tejada and Chase Utley, by revising the official league rules that govern collisions at a base; a decision similar to the rule changes that arose as a result of the Buster Posey injury.<sup>139</sup> The language of Rule 5.09(a)(13)<sup>140</sup> was revised to make clearer the factors that are taken into consideration when determining if a base runner intended to create "deliberate, unwarranted, unsportsmanlike" contact with a fielder when sliding into the base, including the runner's proximity to the base when he slides, and the runner's body position while sliding.<sup>141</sup> However, the new rule falls short in addressing all of the important factors that were the hot topics of discussion in the wake of the Tejada and Utley collision: the timing of the slide relative to the location of the ball on the field, the fielder's position in front of or around the base at the time of the slide, and, perhaps most importantly, the fielder's vulnerability. Addressing some elements of this rule's ambiguity is a start, but by no means is it a sufficient enough step to protect players and completely insulate the league from liability.

Clarifying the standards by which umpires are determining a runner's potential violation of former Rule 5.09 can eliminate some ambiguity, and also encourage teams and players to focus on clean slides within the boundaries of the amended rule. However, a rule is only as effective as the consistency with which it is enforced. The main problem with the language of the rules is the discrepancy between whom the rule gives power to enforce it, and who actually enforces it. The official rule leaves discretion to the umpire to determine whether or not a runner has slid in a

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<sup>139</sup> See *supra* note 102 and accompanying text.

<sup>140</sup> 2015 MLB RULES, *supra* note 4, at 42-3, R. 5.09(a)(13).

<sup>141</sup> *Id.* at 43.

deliberate and malicious way.<sup>142</sup> If there is deemed to be a violation, the runner is out.<sup>143</sup> However, in the case of the Chase Utley slide, the umpires on the field called him safe after the collision with Ruben Tejada, which meant, in turn, that he did not violate Rule 5.09(a)(13).<sup>144</sup> However, Utley was later suspended by the league for violating this very same rule, a rule that gives sole discretion to the umpires, not league officials, to determine a violation thereof.<sup>145</sup> Further, the sanction for a violation of Rule 5.09(a)(13) is that the base runner is to be called out.<sup>146</sup> Nowhere in the rule was a suspension even mentioned.<sup>147</sup> Amended language to Rule 5.09(a)(13), should have gone hand-in-hand with clearer policies on who may enforce the rule, and what the various potential disciplinary measures may be.

### CONCLUSION

Collisions are going to continue to occur between base runners and fielders in MLB. However, the infliction of serious injuries, like the one sustained by Ruben Tejada, must be prevented—or punished. Through a more careful authorship and enforcement of league rules governing collisions on the base paths, injuries like Tejada's can be largely prevented. And, in the alternative, they can be more appropriately and consistently remedied through clearer league policies and disciplinary processes, if not through the application of tort jurisprudence.

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<sup>142</sup> See *id.* (“Obviously this is an umpire’s judgment play.”).

<sup>143</sup> *Id.* at 39, R. 5.09(a)(1).

<sup>144</sup> Gurnick, *supra* note 3.

<sup>145</sup> *Id.*

<sup>146</sup> 2015 MLB RULES, *supra* note 4, at 39, R. 5.09(a)(1).

<sup>147</sup> *Id.*